public." *Accordingly, the Court's task is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."* (See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).*

FACTUAL BACKGROUND

The complaint in this action alleged that on or about May of 1996, Petitioner Gregory L. Hudson, a New York Playwright and theatre artist, hand-delivered a copy of his stage play entitled, *No Harm, No Foul* to Respondents Dwight Meyers, a/k/a Heavy D, (then CEO of Uptown Records, which is a record label under Universal Music Group "UMG" which is a subsidiary of Universal Studios, Corporation) and copies were also delivered to Jimmy Jenkins (alleged co-founder of Uptown Records, CEO of J LUV Entertainment and the brother of Sherill Jenkins) for the purpose of writing the movie version of the Petitioner's play, *Bronx House*, for Dwight Meyers to star in the role of "Skylark." The Petitioner had several conversations with Sherrill Jenkins as reflected in the "missing" Verizon telephone records with respect to writing movies for J LUV Entertainment. During a 28 minute telephone conversation, Sherrill Jenkins (on behalf of Dwight Meyers and others) arranged an August 1996 meeting with the Petitioner to meet with several of the Respondents to discuss the Petitioner's plays and to offer him employment to write movies and television shows for J LUV Entertainment. On or about July or August of 2000, Petitioner saw the motion picture *Life*, produced *inter alia*, Universal Pictures (a division of Universal City Studios LLP) *et al.*, and alleged that substantially similar "Expression of Ideas" in *Life* were copied from the Petitioner's unpublished play titled, *No Harm, No* Foul. The Petitioner hired attorney Mirna L. White from the Law Offices of Adams, Douglas & White, P.C. in 2001 and the first copyright infringement and Breach of Implied-Infact-Contract law suit was filed, *02-CV-2571 (FB) (CP)*, on April 26, 2002. Ms. White conducted no discovery on the case and on or about September 30, 2002, Ms. White coerced the Petitioner into withdrawing his Complaint under false pretense, whereby the Petitioner reluctantly agreed to withdraw the complaint "without prejudice" on the condition that Ms. White would immediately re-file the Complaint. Ms. White was informed numerous times that the statue of

limitations was about to expire and gave her until December 11, 2002 to re-file the Complaint. Ms. White ignored the Petitioner and was fired on December 13, 2002. To avoid losing the case via expiration of the *statue of limitations*, the Petitioner filed a "new" copyright infringement and unfair competition Complaint, *Pro Se*, on February 28, 2003, until new counsel was obtained. This new Complaint was also given to Judge Block. *(03-CV-1008 (FB) (LB)* On November 17, 2003, a grievance was filed with the Brooklyn Bar Association against Ms. White (to get his files which were being illegally withheld by Ms. White and her co-counsel, Ms Jillian T. Timothy). The parties appe ed before a mediator on May 5, 2004, two (2) days after Judge Block entered judgment in favor of the defendants, on May 3, 2004.

As *Pro Se*, the Petitioner quickly learned that the case had been willfully tainted to the extent that no attorney(s) would come near this case unless discovery was reopened. The Court was immediately informed and a requested to reopen discovery for the purpose of obtaining new counsel was filed; the request was denied by on November 26, 2003. On July 28, 2003, the Petitioner received copies of what appeared to be draft copies of the Respondents' movie script entitled, *Life*. The Petitioner immediately informed the Court and the Respondents that "protected expressions" from his stage play entitled, *Bronx House* had also been copied. And forwarded a few pages (for comparison) from *Bronx House, Life* and a sample analysis as evidence; again, a request was made to include Bronx House and the request was denied. On August 30, 2004, the Petitioner filed a "new" Complaint for copyright infringement and Breach of Implied-In-Fact contract (04-CV-6997 (GEL), in the Southern District Court of New York. On May 10, 2005, the SDNY Court granted the defendants permission to file a ***Motion To Dismiss*** the Complaint on the sole round of ***Res Judicata*** and or ***Collateral Estoppel***, stating that *Bronx House* was "adjudicated" by Judge Block. The Petitioner submitted numerous objections, via letters, to the Southern District Court and requested a conference and an oral argument to deny the Defendants permission to file such a "frivolous" motion. The S.D.N.Y. Court did not respond to any of the seven (7) letters and nor were any of these objections, letters or otherwise placed on the docket. The Court set a briefing schedule; Motions due by

9/16/2005; Replies due by 11/21/2005. Responses due by 11/1/2005.

On or about August 1, 2003, the Petitioner retained Mrs. Claudio Baio, a partner at the Law Offices of Baio and Associates. The Petitioner informed Mrs. Baio that opposing counsel (Richard Dunnay and Thomas Kjellberg) had refused to respond to interrogatories pursuant to Federal Rules of Civil Procedures 26, 26(a), 33(a) and others. The Petitioner granted them time to respond and again they refused to comply. When the Petitioner inquired, he was told by Co-counsel Thomas Kjellberg, "you can file a *Motion To Compel* if you want to…we don't care." On September 15, 2003, the Petitioner filed a *Motion to Compel Answers, and a Motion for Preliminary Injunction*). Opposing counsel filed a response to the interrogatories a few days before the discovery deadline and the Court denied the Petitioner's *Motion To Compel* and the request for cost and expenses on October 2, 2003. Mrs. Baio did not demand answers to interrogatories or follow up on the Complaint served upon Dwight Meyers. Instead on or about September 1, 2003, Mrs. Baio, "suspiciously" requested to recuse herself from the case due to an alleged "unforeseen conflict." Ms. Baio alleged that her malpractice insurance company would drop her policy if she pursued this case because Universal Studios was involved. *(Transcription II at 17-20)* This unethical and unprofessional conduct caused the Honorable Magistrate Judge Lois Bloom to order Ms Baio to appear before the Court on October 2, 2003.

At the October 2, 2003 conference, Magistrate Judge Bloom informed Ms. Baio that she had violated Hudson/s attorney/client privilege and that her actions threw the case into turmoil. Judge Bloom also reminded Ms Baio of her responsibilities to her client and her responsibilities as an officer of the Court. At the conclusion of the conference, the Court granted the Respondents leave to move for summary judgment on the sole ground that, as a matter of law, "there was no substantial similarity between the works as to any material protected by copyright." On November 23, 2003, the Respondents moved for summary judgment and on January 9, 2004, the Petitioner opposed the motion for summary judgment. On May 3, 2004, a Judgment was entered by District Judge Frederic Block

dismissing the Complaint by concluding that "no reasonable jury could find that the two works were substantially similar" and dismissing the default against Respondent Dwight Meyers who never responded to the summons and complaint, after being properly served. On May 13, 2003, the Petitioner filed a *Motion to Reargue* and was denied on May 25, 2003.

On May 20, 2004, the Petitioner filed a Notice of Appeal and on or about May 24, 2004, was informed by the E.D.N.Y. Court Appeals Clerk that his "entire case file was missing, with the exception of 6 documents" and could not be forwarded to the Second Circuit. The Petitioner made numerous attempts to obtain information with respect to the "missing documents" and on each occasion was ignored by the Court.

In November of 2004, the Petitioner began reviewing some of the documents forwarded to the Second Circuit Court of Appeals. Needless to say…the case had been "tainted." There were missing documents, unsigned documents and documents that did not belong in the Second Circuit. Strangely enough, the Respondents' Answer from the pending case in the S.D.N.Y. Court was hidden and discovered in the Second Circuit's appeal file and all of the thousands of Verizon telephone records were missing and no one has provided any answers. Via the Petitioner's appeal to the Second Circuit, the Petitioner informed the clerks and the Court that a copy of the Respondents' "Answer" to the "*Petitioner's Copyright Infringement and Breach of Implied-in-Fact Contract Complaint*," (from the SDNY case # 04-CV-6997) was found in the Second Circuit's Appeals records (04-3576-cv). Again, no action was taken.

Since the Courts would not investigate any matters related to this action, the Petitioner filed complaints with; the Brooklyn D.A.'s Office on July 28, 2004; the U.S. Attorney General's Office on August 17, 2004, Department of Justice on September 2, 2004; and a "Racketeering (RICO) complaint with the New York Branch of the FBI on February 7, 2005.

ARGUMENT

The Petitioner's argument is a very simple argument. The Second Circuit and the Lower Court *made numerous errors* and *abused its discretion*, via its rulings, in this case of Hudson *v. Universal Pictures Corporation, Inc., et al*. "Substantial Similarity" between the works does exist, as a matter of law, and the Respondents did in fact copy the Petitioner's work. The Petitioner's only motive in this action was and is to be "properly compensated" for the unauthorized use and destruction of his work, or to have "a trial by jury."

Rather than negotiate in "good faith," the Respondents resorted to methods of deceit, which in turn, resulted in some of the most "egregious misconduct," "obstruction of justice," "tampering with evidence," falsifying documents and other criminal acts, by officers of the Court in modern judicial history. As a direct result of this misconduct, both Courts, *departed from the accepted and usual course of judicial proceedings* and *denied the Petitioner the right to due process*. In doing so, the Petitioner was never given the opportunity to be fully and fairly heard. Instead, the Petitioner was constantly propounded with acts of *prejudice* and *discrimination* reminiscent of the *Jim Crow Law*. This *arbitrary* and *capricious* treatment clearly violated the Petitioner's *civil rights, human rights* and *constitutional rights* to the extent that a "racketeering" (RICO) complaint was filed with the New York Branch of the FBI, Department of Justice, Brooklyn District Attorney's Office and others.

A simple, "detail comparison" of the works in question, as require by the law for determining "substantial similarity" and not a one paragraph, Twenty-two (22) line "Synopsis" of the works conducted by the Lower Court, would have clearly demonstrated copyright infringement and yet, it was never done. The Second Circuit offered no opinion. **There is nothing...more fundamental...to *due process* and the *rule of law* than a "*fair*" and "*impartial tribunal*." Without a fair and impartial judge, "JUSTICE..." can neither be done...nor seem to be done.** The judge's decisions in this case have been "baffling" with respect to the law to say the least. On issues at the Courts' discretion, and in some instances procedural law, *favoritism* continuously raises its "ugly head." For the record, the Petitioner has an "extraordinary"

background with respect to "discretionary" decisions by judges. At one point in the Petitioner's career, it was his job to teach judges how to *interpret* and *analyze* "specific evidence" in order to rule fairly. This training of judges required the Petitioner to sit with the judges, during hearings, to interpret and/or analyze evidence unknown to the judges. In observing some of the judges' discretionary rulings, the Petitioner witnessed biased rulings based upon race, appearance, collegiality, association and other factors independent of the evidence and the law. Having had these experiences, the Petitioner was and is extremely aware of the basis for some of the Court's rulings; notwithstanding the "political" factors. As a matter of fact, New York City owes a great deal of gratitude to the Petitioner for his work with the judges. As a result, the City and all citizens of New York City have and continue to benefit from the fruits of the Petitioner's labor with the judges. The Petitioner also has a very long history with lawyers.

The attorneys' "rush to greed" in this case led to their failure to do due diligence and as a result they all grossly under estimated the Petitioner's resolve, determination, dedication, education, commitment and abilities in the pursuit of justice. As a result, this case has landed in the hands of the *Supreme Court of the United States*; a case which should have been resolved, years ago, out of Court.

I. The Question Presented is whether the Second Circuit erred in affirming the District Court's Sua Sponte Summary Judgment in favor of the Appellees/Respondents and against the Appellant/Petitioner.

Before granting summary judgment *sua sponte*, *the District Court must assure itself that following the procedures set out in rule 56 of the Federal Rules of Civil Procedure would not alter the outcome.*

"Where it appears clearly upon the record that all of the evidentiary material that a party might submit in response to a motion for summary judgment are before the court, a ***Sua Sponte*** *grant of summary judgment against that party may be appropriate if*

those materials show that no material dispute of fact exists and that the other party is entitled to judgment as a matter of law. *See Coach Leatherware, 933 F .2d at 167.*

Before this Supreme Court considers the merit of Hudson's arguments, this Court must examine whether the Lower Court's granting the Respondents permission to move for summary judgment was legal as a matter of law.

The law states that "*All issues of the facts with respect to independent creation must be established prior to a party moving for summary judgment and the party seeking summary judgment has the burden of demonstrating that no genuine issue of material fact exists." See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970.* In layman's term, this means that the Respondents must prove that they independently created the movie, *Life*, without copying from Hudson's work. Under this rule, the Court clearly erred in granting the Respondents leave to move for summary judgment because Mr. Dunnay (lead counsel for the Respondents) stated on *page 73 ¶ 17 -24 of the Court Transcript* "we will not be moving in our motion on the issue of independent creation." Mr. Dunnay went on to say that "we do believe that there was independent creation;" however, the Respondents never provided any proof with exception of some scripts; which in fact, clearly **(pages D00492, D00536, D00653, D0031, D00492, D00516, D00515, D00524, D001120, D00656 and countless other pages)** demonstrate probative copying. *(Pl.Opp. to Def's Mot. to dismiss compl. Ex. #7 & #8)* The Lower Court claimed that "...the Court was under no obligation to consider the scripts..." citing Walker *v. Time Life films*, 615 F. Supp. 430, 436 (S.D.N.Y. 1985), *aff'd*, 784 F. 2d 44 (2d Cir. 1986.). *(Block's Order at 7 ¶ 3)* Judge Block's ruling clearly conflicts with other Circuits. "Thus, the various scripts were relevant and admissible on the issue of independent creation, even though the ultimate test of infringement was the film as broadcast." *(See Cain v. Universal Pictures Co., 47 F. supp. 1013 (S.D. Cal 1941)* The "timing" of the Respondents' scripts raises issues of fact since there was no proof to demonstrate that the work was "available" prior to receiving the Petitioner's work. There must be some relevance of the creative process. Also, "...Because of the different media involved, examination of the various scripts was relevant to plaintiff's showing of the process by which the book was transformed into the

movie." (See *Miller v. Universal City Studios, Inc., 650 F. 2d 1365 (5th Cir. 1981)* The Respondents scripts clearly established that their script was created on June 27, 1996; around the time they received the Petitioner's scripts. There was no other evidence presented or any proof that the Respondents, did in fact, create *Life* prior to gaining ***"Access"*** to the Petitioner's work. Surely, this evidence would be sufficient to raise a fact issue for a jury. The only "possible" reason that the characters, dialogue and other traits between these works are so substantially and strikingly similar is because the Respondents copied directly from the Petitioner's work. "Striking similarity alone can raise the inference of copying" (*See Gaste v. Kiserman 863 F. 2d 1060) (1998). If a material fact is disputed by both sides, then the Court is prohibited from granting a summary judgment.* The Petitioner believes that substantial similarity exists between the works and the Respondents claim that substantial similarity does not exist. By all accounts, the position assumed by the parties constitutes a legitimate dispute of a genuine issue of a material fact and therefore it is unlawful for any Court to grant summary judgment to a party.

"A material fact is one that has 'the potential to affect the outcome of the suit' Bay View Bank v. Highland Golf Mortgagees Realty Trust, 2002 ME 178, ¶ 9, 814 a. 2d 449, 452. *"A genuine issue exists when sufficient evidence requires a fact-finder to choose between competing versions of the truth at trial." Id.* No finder of the facts was appointed in this case. *"In determining whether a genuine issue of material fact exists, the Court must examine the evidence in the light most favorable to, and draw all inference in favor of, the non-movant."* (See *Sheldon v. Metro-Goldwyn Pictures, 81 F .2d 49 (2nd Cir. 1936).* This rule was thrown out of the window in this case. In ruling on a motion for summary judgment, the trial Court decides "whether or not the party opposing the motion has presented any facts which give rise to a "triable issue" or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case. Instead of appointing a fact-finder, to decide this case, District Judge Block assumed that role Sua Sponte; without consulting anyone, including Magistrate Judge Lois Bloom who presided over all of the proceedings. **The sole outcome of this case was placed on the eyes and interpretation of one person, Judge Block, to determine "Sua Sponte whether**

there is a genuine issue of material fact as to whether a substantial similarity to protected materials exist between *No Harm, No Foul* and *Life*." (Block's opinion page 3 ¶ 1) Here, by Judge Block's own admission, Hudson's play, entitled *Bronx House* was not part of this matter; only *Life* and *No Harm, No Foul*...and no other work(s) was considered.

The Second Circuit states that, "*Courts have observed that summary judgment is peculiarly inappropriate in copyright infringement cases due to their inherent subjectivity.*" *See Hoehling v. Universal City Studios, Inc., 618 F .2d 972, 977 (2d Cir.) 1980.* Here, the Second Circuit recognizes the biases, favoritism, prejudices and other forms of discriminations that manifest when individual discretion is introduced. The Second Circuit also recognizes, as did the forefathers of this country's judicial system, that in the wrong hands, "Sua Sponte" grants entirely too much power and authority to one individual; and yet...the Lower Courts' decision was affirmed and to boot, the Second Circuit did not offer an opinion of its own alleged "De Novo" review of this case. The public is simply expected to accept the Courts' word as the truth. This is not how the American Judicial System and the Law is suppose to work **"If this is how the Law in America works...then give me lawlessness; I like my chances much better when the Law is in my own hands." (Gregory L. Hudson)**

The record will reflect that both Courts simply ignored, disregarded and/or passed on the Petitioner's evidence and materia. acts as if the Petitioner was not intelligent enough to notice; notwithstanding the fact that the Petitioner is an educator, has a *M.F.A. in performing arts*; a *B.A. in theatre* and has more than *forty years (40) in all aspects of the performing arts*. The Second Circuit departed from its own accepted and usual course of judicial proceeds, as well as, its rule on "Sua Sponte Summary Judgment."

The standard for review upon appeal is De Novo, meaning, "to review the case as if it was never reviewed."

It is highly unlikely that the Second Circuit reviewed this case De Novo in light of all of the scripts, video-tapes, motions, analysis, the sheer volume of evidence submitted and the Court's

affirmation. The Second Circuit simply issued a "generic statement" stating, "Familiarity by the parties is assumed as to the facts..." "Familiarity" is not assumed by the parties... there is a very serious and legitimate dispute and/or controversy between the parties as to "whether substantial similarity of protected expression between the said works exist." The Second Circuit's statement and the affirmation, when compared to the Second Circuit's history, with respect to the thorough opinions in copyright cases are sad; especially, in light of the high standards established on copyright opinions by this Court. The Second Circuit's rubber stamping and generic statement as apposed to a "detailed comparison" of the works and a "De Novo" review is illegal; notwithstanding the fact that it "conflicts with other Circuits, particularly the Ninth Circuit which handles far more copyright infringement cases. A simple examination of the cases cited in the Second Circuit's affirmation, the citations by the Lower Court and the Respondents will reveal a "startling contrast to the opinions rendered" with respect to this case, *Hudson v. Universal Picture Corporation, Inc, et al. (See Hoehling v. Universal City Studios, Inc., 168 F .2d 872 (2d Cir. 1980), Miller v. Universal, William v. Crichton, 84 F.3d 581 (2d Cir. 1996, Nichols v. Universal Pictures, Corp., 45 F.2d 119 (2d Cir. 1930)* The only difference between these cases and Hudson's case is that (1) Hudson's case provided more probative evidence than any of these cases, (2) all parties in the above-referenced cases are represented by lawyers and (3) "a detailed comparison" was conducted as prescribed by the law on all of the above-referenced cases except Hudson v. Universal Pictures. The reason a detailed comparison between the works in this case was never done is because the final result will clearly show that a genuine issues of the material fact exist and will, undoubtedly, exceed the preponderance of evidence needed to demonstrate substantial, and in many instances "striking," similarities between the works.

The Petitioner does not imply that Judge Block or any other officer of the Court cannot be trusted "Sua Sponte;" however, this unchecked and unsupervised power has led to and will continue to lead to the likes of the disgraced and corrupted Justice, Gerald P. Garson, as well as his corrupt cousin, Michael J. Garson.

Justice Gerald P. Garson is the Brooklyn New York Judge who caught on video tapes for taking bribes from crooked lawyer Paul Siminovsky and was arrested on bribery charges for fixing divorce case; along with his clerk, and court officer, Paul Serlerno. Justice was caught on video tape taking bribes and quoted "The best thing about this job is that I don't know what the f_ _ k its going to bring until I get here." He later quoted, "...and I don't give a f _ _ k either!"

Again, this in no way implies the Courts' decisions were motivated by anything other than their opinions in this matter.

II. The Second Question Presented is Whether the Second Circuit departed from the accepted and usual course of judicial proceeding by sanctioning the Lower Court's refusal to grant the Petitioner leave to reopen discovery and amend the Complaint to include the stage play, entitled, Bronx House.

The rule of law for Summary judgment is appropriate only *"if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits...show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c) of the Fed. R. Civ. P. also Celotex Corp. v. Catreet, 477 U.S. 317, 322-23 (1986).*

The probative evidence of copied "protected expressions" from *Bronx House* by the Respondents, clearly demonstrate that a genuine issue of the fact exist.

Again, another long established Second Circuit rule with respect to discovery is *"Discovery must either have been completed, or it must be clear that further discovery would be of no benefit. The record must, therefore, reflect the losing party's inability to enhance the evidence supporting its position and the winning party's entitlement to judgment." See Ramsey v. Coughlin, 94 F .3d 71 (2d Cir. 1996)* If we are to accept this rule, then the Second Circuit has clearly erred again by denying Hudson leave to amend the Complaint to include *Bronx House*.

"Nevertheless, "[c]are" should, of course, be taken by the district court to determine that the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried, and that the party for whom summary judgment is rendered is entitled thereto as a matter of law." Id.; see also Charles A. Wright et at., Federal Practice and Procedures § 2720, at 34 (2d ed. 1983)

Denying relief to amend the Complaint and include *Bronx House* preempts any and all notions that the Petitioner had a full and fair trial and was fully heard. On March 18, 2005, the Petitioner argued (Second Circuit) that "since *Bronx House* was not admitted as evidence, the Court could not determine if a genuine issue of material fact exists." He argued that "In order for the Court to determine if a material fact exists, the Court must examine the facts…and…that if the Court did not examine the facts, the Court could not determine the facts.," adding that this is deemed *"Sine Qua Non."* Here, the Lower Court departed from the usual and accepted practices of judicial proceedings and the Higher Court sanctioned this ***arbitrary and capricious*** treatment. The Petitioner also argued (hear oral argument audio tape) under *Rule 15a and 15d of the Fed. R. Civ. P.*, "that he should have been allowed to amend the Complaint." Amending Complaints are as common place as initial conferences. To boot, Judge Mukasey presided over Cerutti v. Cerutti, a case which was amended…and he wrote a superb "detailed comparison" of the two works. All of the Judges in this case have allowed cases to be amended.

The Lower Court's refusal to grant leave to amend the Complaint to include *Bronx House* and the Second Circuit's affirmation has created a most confusing and perplexing problem in this case that it begs for the Supreme Court's supervisory powers. Below is an example of the confusion, mixed messages and total chaos caused as a direct result of the Court's decision.

The Petitioners was forced to file a new Complaint for *Bronx House* in the S.D.N.Y. Court. (04-CV-6997) (GEL). In response, the Respondents filed an Answer claiming Res Judicata and/or Collateral Estoppel. In this action (*No Harm, No Foul*), Eastern District of New York Court ["E.D.N.Y."], before Judge Block and

Judge Bloom, the Respondents vigorously argued that *Bronx House* should not be and was not part of this action. Furthermore, The Respondents successfully kept *Bronx House* out of this matter and successfully suppressed (with the aid of the Petitioner's own attorneys and representatives of the Court) any and all evidence. On the contrary, the Respondents are now claiming in the Southern District New York Court ["S.D.N.Y."], that *Bronx House* "was in fact adjudicated by Judge Block" in the E.D.N.Y. This is "*perjury*," "*misrepresentation of the facts* and "*willfully*" and "*knowingly lying*" to the Court.

"So, when you're talking about *Bronx House* and there is absolutely nothing in your complaint regarding *Bronx House*, all of that is out. That's not going to be part of this matter. I want to be clear," states Judge Bloom." (*Court Transcript page 45 ¶ 14-18, at the October 2, 2003, Conference.*) Again, Magistrate Judge Bloom, as did District Judge Block, clearly states that *Bronx House* is not part of this matter.

Which one is it? Was *Bronx House* adjudicated or not? The Respondents cannot have it both ways. Either *Bronx House* was adjudicated or *Bronx House* was not adjudicated. If *Bronx House* was adjudicated by Judge Block, then it was adjudicated unlawfully, without any evidence submitted (i.e. *Bronx House* Script, Video-Tapes...etc) and summary judgment was improper. If *Bronx House* was not adjudicated, as the Honorable Judge Bloom so emphatically and clearly stated, then the Petitioner's new action pending in the S.D.N.Y. Court, before the Honorable District Judge Gerard E. Lynch, is valid and the Respondents claim of Res Judicata and/or Collateral Estoppel is preempted; besides, the "extra element" of Breach of Implied-in-Fact contract preempts the Lower Court from dismissing the *Bronx House* Complaint. Notwithstanding, Judge Lynch told the Respondents at the December 8, 2004, conference that "I (Judge Lynch) have read both Judge Block's and Judge Bloom's opinions and I don't see where *Bronx House* was adjudicate." Judge Lynch then added, "If you (to Mr. Dunnay) believed that *Bronx House* was adjudicated then some kind of motion would have been filed." Judge Lynch "Stayed" all actions pending the Second Circuit's decision. Again, the Petitioner vigorously objected to the Court's granting the Respondents

permission to file a Motion to Dismiss, but none of pleadings, via letter, was ever acknowledged and nor were they placed on the docket.

ALTHOUGH JUDGE BLOOM DID IN FACT MAKE IT "ENTIRELY CLEAR" THAT *BRONX HOUSE* WAS NOT PART OF THIS MATTER, her honor did in fact make a mistake in her statement that "*...there is nothing in your Complaint about Bronx House...*" Annexed to the Complaint is a letter dated August 26, 1996, which clearly demonstrates that *Bronx House* was indeed apart of this matter. As a matter of fact, "but not for" *Bronx House*, there would be no lawsuit. The Petitioner invited Dwight Meyers and his associates to see a performance of *No Harm, No Foul* for the purpose of observing the playwright's writing style; however, the main purpose was the offer to write a movie version of *Bronx House* specifically for Dwight Meyers to star in the role of "Skylark." This fact clearly contradicts Judge Block's logic for dismissing the default judgment against Mr. Meyers. (Block's opinion at 10 ¶ 3) "There is nothing in Hudson's complaint to indicate that Meyer's liability would hinge on some fact not applicable to any other defendant in this action." No Dwight Meyers...no Complaints. Dwight Meyers is, by all accounts, the **conduit** by which Hudson's plays were "***accessed***," "***copied***" and ultimately "***produced and distributed***" *inter alia* by **Eddie Murphy, Universal Pictures and others**.

> *For the record, Hudson holds the Honorable Magistrate Judge Lois Bloom in the highest esteem and is ever so grateful for the professionalism, dignity and respect shown to Hudson by her honor, in her Court, through out the proceedings. What little faith and/or confidence Hudson has left in the judicial system is as a direct result of Judge Bloom.*

This Supreme Court must clarify this question surrounding *Bronx House* or; (a) The Second Circuit and the Lower Courts will have the authority to "selectively" and "arbitrarily" apply the law based solely upon who the parties are; (b) the Supreme Court will in fact be unnecessarily deciding much of this case again if *Bronx House* Complaint is dismissed; and (c) other Courts will be totally

confused as to the proper judicial procedures for deciding future matters similar to this case, *Hudson v. Universal Pictures Corporation, Inc., et al.*

The Second Circuit agreed with the District Court that "no reasonable jury, properly instructed, could find that the two works are substantially similar."

Determination of substantial similarity requires a detailed comparison of the works at issue, including "such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting." Williams, 84 f.3d at 588. In this matter, a detailed comparison of both works was never done. The Second Circuit issued no opinion and the Lower Court "carefully" and "selectively" compared elements believed to be "dissimilar" to support a favorable ruling for the attorneys and their "special interest" corporations. We must recognize that dissimilarity between some aspects of the works will not automatically relieve the infringer of liability, for, "no copier may defend the act of plagiarism by pointing out how much of the copying he has not pirated." (*See Roger v. Koons 960 F. 2d 301, 308 (2d Cir.) cert. denied, 506 U.S. 934 (1992).* An examination of the Lower Court's findings will support a verdict in Hudson's favor. The Lower Court's endorsement of the Respondents' synopsis of their work is wrong. (*Block's opinion at p.6-7*) Eddie Murphy, the producer of *Life*, characterizes his movie, *Life*, as a "big prison break movie." Since Judge Bloom warned the Petitioner to hold his evidence "close to his vest" due the misconduct by of his attorneys, this evidence, and more, was never submitted.

In the Lower Court's brief, a twenty-two (22) lines, single paragraph comparison (not a detailed comparison) of the alleged similarities still support Hudson's claims. (*Block's sum op. p. at 8*) Court intentionally omitted a detailed comparison of the "main characters," "dialogue," "costumes," and other traits between the works and made no reference to the "striking similarity" between the characters from the sixty plus photographs. Also, there is no mentioning of the "paraphrased dialogue" and the "split dialogue" between the works. The evidence clearly shows, beyond any doubt and in plain English, that the characters mentioned by the Lower

Court were copied from the Petitioner's work. The Court claimed that there were no substantially similar "protectible elements" between the works. What standard did the Court use to determine that no substantially similar protectible elements existed between the works? The law requires a detailed comparison; the Court's presented one single paragraph.

In evaluating claims of substantial similarity, courts have examined different aspects of the works in question. The Courts must consider the **"totality of the characters attributes and traits;" motivation for characters, skills, credentials, interpersonal relationships, dialogue, costumes, mannerism, interplay, physical appearance, sequence of events and plots**, as was done in cases such as; *the Kelly's and the Cohens; Towlers v. Sayles; Sheldon v. Metro Goldwyn Meyers; William v. Crichton, Gaste v. Kaiserman, Beal v. Paramount, Nichols v. Universal; Miller v. Universal, Harper & Brothers v. Kalem;* Such examination of these "traits" was never done by the Second Circuit or the Lower Court in this matter, nor were any of these cases cited by the Petitioner referenced. Instead, the Second Circuit and the Lower Court referenced copyright cases such as *Hoehling v. Universal City Studio, Inc., 618 f .2d 972, 977 (2d Cir. 1980);* a case about the "Hindenberg." The *Hoehling* case deals primarily with issues about the "historical facts;" and since facts cannot be copyrighted, Hoehling, by all accounts, is not an appropriate case which can be viewed in the light most favorable to the non-movant. On the contrary, *Sheldon v. Metro Goldwyn Meyer* (opinioned by the Honorable Judge Learned Hand, who is the single most quoted jurist of the 20th Century) was passed on and so were other cases which dealt directly with copyright cases involving "fictional films and plays."

The Lower Court cites Warner Bros., Inc. 720 F.2d at 241, (referring to the similarities between the character Colorado (of the play) and Can't git right (of the movie) "the mere use of a character with a speech impediment fails to rise to infringement, as the Court must consider the 'totality of the characters' attributes and traits'."

The Second Circuit's rule is that "In applying the maxim for this purpose, care must be taken to recognize that the concept of

"substantial similarity" itself has unfortunately been used to mean two different things. On one hand, it has been used as the threshold to determine the degree of similarity that suffices, once access has been shown, as indirect proof of copying; on the other hand, "substantial similarity" is more properly used, after the fact of copying has been established...") See *Laureyssens v. Idea Group, Inc., 964 F .2d 131-40 (2d Cir. 1992); Nimmer § 13.01 [B].*

"Copying was never admitted or established by the Respondents in this case. The Lower Court simply granted the Respondents leave to move for summary judgment on the "sole ground of substantial similarity." Again, the "issue of independent creation" was never established.

The 11th Circuit states that "The Plaintiff-Appellant must show that the Defendants-Appellees' work is substantially similar to the plaintiff's protected expressions" only; and not the Plaintiff-Appellant's entire work. (*See Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F .2d 821, 829 & n. 11 (11th Cir. 1982)*

The Ninth Circuit states "*The district court specifically enumerated plot, mood, characterization, pace, and setting as relevant factors," and so does the Second Circuit. See 806 F. Supp. At 967 (citing Walker v. Time Life Films, 784 F .2d at 49 and Litchfield v. Spielberg, 736 F .2d 1352, 1357 (9th cir. 1984); Also see William v. Crichton, 84 f .3d 581 (2nd Cir. 1996) Reyer v. Children's Television Workshop, 533 F. 2d 87, 91 (2d Cir.), cert. denied, U.S. 1145 Ct. 1318 (1994).* Petitioner claimed infringement of "protected *Expressions,"* not the *entire work*"

The Court's claimed that "...but these similarities are not particularly emblematic of creative expression; rather, they are more in the nature of non-protectible ideas or *scenes a faire* common to the prison movie genre." This claim fails miserably. The Petitioner's play, *No Harm, No Foul*, is not a *prison drama*; it is an "*outrageous comedy which takes place on an illegal slave plantation.*" The prison similarities between the two works were copied directly from the Petitioner's play, *Bronx House*; which is indeed, "a *prison drama.*" The Respondents characterizes the movie, *Life*, as a "Comedy/Drama." That is no coincidence; the comedy

was copied from *No Harm, No Foul* and the Drama was copied for *Bronx House*.

Even if we accepted the Courts finding that the similar elements were *scenes a faire* common to prison drama, that finding also fails miserably. *Scenes a faire* comes from the French term "that which must follow." If this term is applied to the movie, *Life*, the prison setting would consist of jail cells, bars, fences and other elements common to prisons in general. On the contrary, *Life's*, alleged prison setting is almost identical to that of *No Harm, No Foul*, which is essentially an opened field whereby the characters can move about freely so long as they do not cross the "Boundary Line" (*In Bronx House*) or the (Gun Line) in *Life*. The term "scenes a faire," in its current meaning, cannot and should not be applied to works of fiction, particularly in American contemporary drama. As a writer, nothing must follow except whatever the writer's imagination and creativity so desires in a *fiction*. That's why it is called *fiction*, or *make believe*. The term "that which could follow" (as apposed to "*that which must follow*") is more appropriate for *scenes a faire*.

Bear in mind that during the Elizabethan period, 18th Century comedies and French comedies, the theatres had no electrical lights and/or lighting system; therefore, most of the dramas were performed during daylight hours and with strict limitations with respect to creativity. In other words, writers wrote similar plots, characters, settings and other theatrical elements due to these restrictions and other factors. Also, many of the characters were "stock characters," *characters which have become conventional in particular genres through repeated use*. Most writers of these periods used these writing techniques out of necessity due to the circumstances. Also, this technique or style enabled the actors to become more employable by maintaining similar characters in their repertoire which could be used in other similar dramas upon short notice. In contemporary American dramas, none of those restrictions exists for writers and therefore, this notion of *scenes a faire* is inapplicable in works of fiction and is substantiated by the "Merger Doctrine." The Merger Doctrine tells us that in works of fiction, there are thousands of ways for authors to express the same idea. The only possible reason the same ideas

are similarly expressed between the works in this action is because the Respondents copied from *No Harm, No Foul* and *Bronx House*. The Supreme Court can correct a long standing wrong by removing or reconsidering the manner by *which scenes a faire* has been and continues to be improperly used in copyright infringement cases. Having more than four (4) decades of experience and education in the performing arts and after reviewing the alleged writers of *Life*, **Robert Ramsey** and **Matthew Stone** works, the Petitioner can state with a high degree of certainty that neither of them have the writing skills and or ability to independently write a movie such as Life...and to boot, there was and is nothing in their background that demonstrated or beckoned the likes of Universal Pictures to entrust them to write a Twenty-Million Dollar movie with an all-star cast such as *Life*. To ask anyone to believe this is downright insane.

III. The Question is Whether the Second Circuit abused it's discretion by passing on instead of ruling on the Lower Court's dismissal of a properly served Default Judgment against Dwight Meyers, a/k/a Heavy D.

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default. *(Federal Rule of Civil Procedures 55(a), (b).*

The 2nd Circuit Court of Appeals has long since established its criteria for determining whether to grant relief from an entry of judgment of default: ***(1) Whether the default was willful.*** ("A default should not be set aside when it is found to be willful.") *Brien v. Kullman Indus., Inc., 71F. 3d 1073, 1078 (2d Cir. 1995)* (indicating that a finding of willful default will result where a defendant deliberately chooses not to appear in an action"). *(See Marziliano v. Heckler, 728 F. 2d 151, 156 (2d Cir. 1984) (*citing Traguth v. Zuck, 710 F. 2d 90, 94 (2d Cir 1983). Pursuant to this Court's own rules, Dwight Meyers "*waived his right to challenge the merit of the complaint when he willfully chose not to respond or enter a plea,*" and was thereby unlawfully relieved of default.

"Notwithstanding his deportation, he could have been defended by an attorney or communicated with the Court by mail" is what the Second Circuit told the Appellee here period...and...the merits of the Complaint were not at issue here. Dwight Meyers, by all account, should have been told the same thing. (*See Acton S.A. v. March & Co., Inc. 951 F. 2d 504, 507-08 (2d Cir. 1991);* ***(2) whether setting aside the default would prejudice the adversary.*** *Enron Oil Corp. v. Diakuhara, 10 F .3d 90, 96, (2d Cir. 1993);* Malvina D'Orange *v. Charles L. Leely Securities and Exchange Commission v.* Michael Risesman. Setting aside this default rewards Dwight Meyers for blatantly placing himself above the law and creates extreme, harsh and unfair prejudice and undue burden against the Petitioner. Dwight Meyer's direct involvement and his contract with Universal Pictures implicate him as more than just an actor in the movie. If the President of the United States of America is required to answer a complaint, so should Dwight Meyers. (*Paula Jones v. William Clinton*) ***(3) Whether a meritorious defense is presented for "good cause."*** "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." *(Rule 55(c) of the Federal Rule of Civil Procedures.)* The fact that Dwight Meyers never entered a plea preempts any claim of a meritorious defense or a "***good cause***" and is *sine qua non*. For this Court to enter a plea for "good cause" on Dwight Meyers' behalf, is indeed an "abuse of this Court's discretion" because this Court would be, in fact, speaking on the record on behalf of Dwight Meyers and thereby acting as Dwight Meyers' attorney.

IV. The Question Presented is Whether the Appellant/Petitioner's constitutional right to *Due Process* was violated during the proceedings of this case?

The Seventh Amendment guarantees the right to a jury in civil trials if there is an issue to be tried. The Bill of Rights states:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

A review of the (sixty plus) photographs submitted as *Exhibit 23*, in support of the Petitioner's opposition to the Respondents' *Motion for Summary Judgment to Dismiss the Complaint*; the partial analysis of the works annexed to the Complaint; the Verizon telephone records (if they still exist); the character similarities, the dialogue similarities, the video tapes and specific pages from the Respondents' scripts clearly demonstrate triable issues for a jury; notwithstanding the copyright law itself.

The Fifth Amendment contains a guarantee of basic due process. "No person shall be ...deprived of life, liberty, without due process of the law..." and the 14th Amendment contains the same verbiage. Due Process in the United States is a legal concept that clearly places limitations on laws and legal proceedings to guarantee fundamental fairness, justice, and liberty. A review of the Petitioner's Motion To Compel Answers; Motion for Temporary Injunction; Grievance to the Brooklyn Bar Association against his attorney, Mirna L. White; the October 2, 2003, Court Transcript of which Judge Bloom admonished Ms. Baio for "Suspiciously" attempting to recuse herself from the case; the Court's allegedly losing all of the documents in this case; thousands of version telephone records disappearing from the Court; the Courts refusal to answer and or respond to many of Hudson's petitions or requests; Mr. Dunnay's and Mr. Kjellberg's deliberate and blatant disregard for the Federal Rules of Civil Procedures and so forth. Mr. Dunnay used similar tactics during the discovery period for which he was severely sanctioned by Magistrate Judge Foschio. (*See Burns, Zoll v. Imagine Films Entertainment, Inc., & Universal City Studios, Inc; MCA, Inc., No. 96-7785*. Eddie Murphy's records clearly demonstrate a habit and a pattern and a very long history of willful copyright infringement against writers he presumed to be lesser known.

Procedural Due Process is essentially based on the concept of procedural fairness. As a bare minimum, it includes an individual's right to be adequately notified of charges or proceedings involving him, and the opportunity to be heard at these proceedings. The Petitioner was not given the opportunity to be heard or notified of all charges or proceedings involving the

Petitioner. Surely, no one can claim that the Petitioner was not denied due process under these circumstances.

This appeal from the lower Court's decision is the concrete expression of how completely obliterated due process and the rule of law becomes in the hands of self-interested officers of the Court. NOT ONE SINGLE PLEADING, DISCOVERY or DEPOSITION was ever pursued by Hudson's attorneys. As hereinafter shown, the Second Circuit and the Lower Court's decision not only departs from cognizable adjudicative standards in substituting conclusory characterizations for factual findings, but in every material respect, falsifies, fabricates, and distorts the record of the proceeding to deliberately assassinate the Petitioner's case and deprive him of the relief to which the record resoundingly entitles him.

The *Federal Rules of Civil Procedure* was annihilated during these procedures, particularly *Rule 26 and 37*. Their answers to *Interrogatories* were evasive and incomplete. Rather than provide honest answers to these discovery requests, the Respondents stonewalled, presented irrelevant objections to the entire discovery request, and responded to key requests with pleas of ignorance. The Defendants waited until the very last moment to provide those responses, recognizing that the Petitioner would be unable to move to compel more complete responses and discovery before the discovery deadline. By engaging in this egregious conduct, these attorneys obliterated the very oath they were sworn to up hold; *the Model Rule of Professional Conduct* and *the Code of Professional Responsibility*. Hudson's attorneys' and opposing counsel breeched their "obligation as lawyers and officers of the Court and thereby denied Hudson the fundamental guarantee of fairness, justice and liberty. Reasonable people and otherwise have concluded that the documents (as tainted as they are) in this case were not missing. It appears that a concerted effort was made to "dispose" of those documents in an effort to conceal the 'devastating misconduct" of these officers of the Court, who took a solemn oath to uphold the law. Since when did the Courts take it upon themselves to "change CAPTIONS" in cases? Someone changed the Caption in this case from Hudson v. Universal Pictures to Hudson v. Imagine Entertainment. The only justification for this change is to conceal Universal Studio's liability and to protect its reputation. As a direct

result of this illegal and unauthorized change, the Petitioner pleadings and motions are submitted as Hudson v. Universal (as the complaint was filed and all other documents up to the appeal) and on the other hand, the Respondents are submitting their documents as Hudson v. Imagine Entertainment (the changed Caption). Which one is the correct Caption? The Petitioner raised this issue again during oral argument before the Second Circuit and, surprisingly, the Second Circuit passed on it. These are not absurd allegations...these are documented facts on the record.

"Special interest groups," must not run the judiciary or in the words of Justice Steven G. Breyer stated on the "Judiciary Independence" panel on CSpan, moderated by Professor Ogletree, " the judiciary must maintain its independence from political pressure or otherwise." Justice Breyer later added, "Who would you rather have preside over your case...a judge who is appointed for life with no political pressures or a judge who must compete for his job?" Justice Breyer's statement goes to a statement quoted by District Judge Lynch, who now presides over Hudson v. Universal Studios in the S.D.N.Y. "The Supreme Court, because it doesn't have to answer to the American people in elections, is better placed to decide a proposed course of action that meets short-term political objectives and is consistent with moral values which our society considers itself bound." (Senate *Floor Statement of Senator Sessions...Nomination of Gerard E. Lynch...Tuesday, May 23, 2000*) This case should be decided on the facts, the evidence and the law and as opposed to political and/or the parties involved in this matter. Ms. Baio told Judge Bloom that she had to withdraw from the case as Hudson's counsel because her insurance company would cancel her insurance policy. When pressed for a more complete answer, Ms. Baio told Judge Bloom that she had to withdraw because "Universal Studios" were involved. Ms. Karen Steinberg, another one of the Petitioner's attorneys, hired by Ms. Baio, appeared before judge Bloom "without a clue of the case." In the words of Judge Bloom, "She was hung out to dry,' by Ms. Baio. This Court only has to examine the Court Transcript to see the mockery made of the judicial proceedings in this matter. In spite of a tremendous effort to conceal this case from the public, one only has to log on to

to view these pleadings and documents in their original content.

Requests have been made upon the Petitioner from colleges and universities to be the "custodian" of the Petitioner's copies of the proceedings. These request reflects the importance this case, especially scholarship, contradicts the Courts decisions to order the Lower Court's opinion "for online use only" and the Second Circuit's order that this case not be reported in the Federal Reporter. Also, the requests have been made upon the Petitioner to appear as a "Guest Lecturer" with respect to this action and hundreds of lawyers, professors and others are following this case via . So this case is very important and this Court's ruling is of paramount importance. Much has been made of Hudson's *Pro Se status* but nothing of Hudson's education, background, knowledge and expertise in the performing arts field, notwithstanding his knowledge of Copyright Law as it pertains to dramatic works. Hudson's submission procedurally may not be perfect; however, procedure should not supercede substance. Copyright Law advances legally and scholastically when cases of this nature are tried in court.

The Fourteenth Amendment guarantees the Petitioner "equal protection of the law." A review of this case or the "unaltered" official Court Transcripts clearly demonstrates that this was not the case. On oral argument, the Petitioner argued that his treatment from the judiciary had at times been "nothing less that arbitrary and capricious." He argued that the Court had two set of rules or two "separate Courts" and that is "separate but equal" treatment which was ruled "unconstitutional" in *Brown v. Board of Education, 347 U.S. 483 (1954) (USS+).* The playing field in this matter has never been level; instead, the Courts adopted the "separate but equal" doctrine adopted in *Plessy v. Ferguson, 163 U.S. 537*, which has no place in the American Judicial System. The Lower Courts have clearly spoken in their decision in this matter; in other words, the Petitioner (like Dred Scott, a slave in 1857) "lacks standing in this judicial system." (*See Dred Scott 1857*)

V. The Question Presented is whether the Second Court erred in affirming the District Court's dismissal of the Unfair Competition claim against the Appellees/Respondents.

"Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any work, term, name, symbol, or device, or any combination thereof, or any false designation of orgin, false or misleading description of fact, or false or misleading representation of fact, which (a) is likely to cause confusion, or mistake...shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act." (*Lanhan Act, 15 U.S.C. § 1125, False designations of origin, false descriptions, and dilution forbidden*.

The public has confused elements of the defendants' work with Hudson's work. The fact that representatives of the Respondents offered Petitioner work, adds "extra element," therefore, preempts dismissal of the Unfair Competition action. (*See Buchwald v. Paramount Pictures Corporation, Inc.13 USPQ .2d (BNA) 1497, 1990 WL 357611 (Cal. Super. Ct. 1990).* Judge Mary M. Schroeder wrote in a ruling for a three-judge panel on Sept. 8, "a contract sometimes may be implied even in the absence of an express promise to pay." (*See Grosso v. Miramax Film Corp., No. 01-57255 (9th Cir. Sept. 8, 2004)* Out of the thousands of ordinary people and otherwise, who have reviewed the photographs, scripts and other evidence, the Second Circuit and the Lower Court are the only ones who cannot see "substantial similarity between both works.

CONCLUSION

The basic premise of copyright law is that expressions are protected and therefore copyright infringement exists if protected expression is wrongfully appropriated. (See *17 U.S.C. § 102(a); Baker v. Selden, 101 U.S. 99, 25 L. Ed. 841 (1880 Beal v. Paramount Pictures Corporation 20 F .3d 454; 1994 U.S. App. LEXIS 10376 11TH Cir. It is only necessary that the non-moving party demonstrates that a genuine as apposed to a frivolous issue of fact exists, therefore, in opposing a summary judgment it is not necessary that the non-moving party demonstrates that he would win on the issue.*

This case imposes upon this Supreme Court of the United States a heightened sense of responsibility to ensure equality, neutrality within the judicial system and that the assigned tribunal provide the Petitioner and all citizens their constitutional right to a trial by a jury of their peers and to be fully and fairly heard by a fair and unbiased tribunal. Furthermore, the judiciary has a heightened responsibility to scrupulously adhere to the "random selection" rules that govern case assignments. That was not done here. Instead, this case was "steered" to the same judge, for a second time, who flouted his responsibility by woefully departing from cognizable adjudicative standards and by not sanctioning the Petitioner's attorneys, the Respondents and their attorneys for their "egregious conduct" through out the proceedings during discovery.

As such, this Court's duty goes beyond reversing the decision and granting the Petitioner the relief warranted by the record. Based upon this Court's own case law, that would include granting the Petitioner's ***writ of certiorari***. For the foregoing reasons, the decision, in its entirety, must be reversed and the Order & Judgment thereon vacated. Accordingly, this Court should issue a Writ of Certiorari to review this case, and resolve the dispute between circuits, and to answer these important questions, which surely will be debated for decades to come and to ensure the ***fairness***, ***integrity*** and the ***public reputation of judicial proceedings***.

WRIT OF CERTIORARI SHOULD BE GRANTED

Dated: August 27, 2005
Queens, New York

Respectfully Submitted,

Gregory L. Hudson. Pro Se
146-61 182nd Street
Springfield Gardens, NY 11413
(718) 341-8997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 1st day of April, two thousand and five.

Present: HON. RICHARD C. WESLEY,
HON. PETER W. HALL,
Circuit Judges,

HON. MICHAEL B. MUKASEY,
District Judge.[1]

..----------X

GREGORY L. HUDSON,

Plaintiff-Appellant,

04-3576-cv

---

[1] The Honorable Michael B. Mukasey, Chief Judge of the United States District Court for the Southern District of New York. sitting by designation.

UNIVERSAL PICTURES CORP., IMAGINE ENTERTAINMENT CORPORATION. EDDIE MURPHY,

Defendants-Appellees,

DWIGHT MEYERS, BRIAN GRAZER,

Defendants.

----------X

Appearing for Plaintiff-Appellant: GREGORY L. HUDSON, Springfield Gardens, NY, for *Plaintiff-Appellant, Pro Se.*

Appearing for Defendants-Appellees: RICHARD DANNAY (Thomas Kjellberg, on the brief), Cowan, Liebowitz & Latman, P.C., New York, NY, for *Defendants-Appellees.*

Appeal from the United States District Court for the Eastern District Court of New York (Block, J.)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED that the judgment of the district court be **AFFIRMED**.

Familiarity by the parties is assumed as to the facts, the procedural context and the specification of appellate issues. Plaintiff-Appellant Gregory Hudson argues that the district court erred in granting summary judgment to the defendants and dismissing his claim. After undertaking *de novo* review of the

district court judgment, we now affirm.

To succeed in an action for copyright infringement, a plaintiff "must first show that his or her work was actually copied." *Laureyssens v. Idea Group, Inc.*, 964 F .2d 131, 139 (2d Cir. 1992). "If actual copying is established, a plaintiff must then show that the copying amounts to an improper appropriation by demonstrating that substantial similarity to protected material exists between the two works." *Id* at 140. "If the similarity concerns only noncopyrightable elements of plaintiff['s] work, or no reasonable trier of fact could find the works substantially similar, summary judgment is appropriate." *Williams v. Crichton*, 84 F .3d 581, 587 (2d Cir. 1996) (internal quotations omitted). In this case we agree with the district court that "no reasonable jury, properly instructed, could find that the two works are substantially similar." *Arica Inst., Inc. v. Palmer*, 970 F .2d 1067, 1072 (2d Cir. 1992). We therefore hold that the district court did not err in granting summary judgment.

Hudson further argues that the district court erred by dismissing his New York state law unfair competition claim. We agree with the district court that his unfair competition claim is preempted by federal law, as it does not "include any extra elements that make it qualitatively different from a copyright infringement claim." Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc. 373 F. 3d 296, 305 (2d Cir. 2004). We have carefully considered Hudson's remaining arguments and find them to be without merit. Accordingly Accordingly, for the reasons set forth above, the judgment of district court is hereby

AFFIRMED.

For the Court

Roseann B. MacKechnie, Clerk

By: Olivia M. George,
Deputy Clerk

APPENDIX B

FOR ONLINE PUBLLICATION ONLY

UNITED STATES DISTIRCT COURT
EASTERN DISTRICT OF THE UNITED STATES
----------X

Gregory L. Hudson,

Plaintiff

Mem. & order
03-CV-1008
(FB)(LB)

-against-

Universal Pictures Corporations,
Imagine Entertainment Corporation,
Eddie Murphy, Dwight Meyers a/k/a
Heavy D, Brian Grazer, Robert Ramsey,
and Matthew Stone,

Defendants.

----------X

Appearances:
For the Plaintiff:
GREGORY Hudson,
Pro Se
146-61 182nd St.
Springfield Gardens,
New York 11413

For the Defendants Universal
Pictures Corporation, Imagine
Entertainment Corporation,
and Eddie Murphy
RICHARD DANNAY, ESQ.
THOMAS KJELLBERG, ESQ.
Cowan , Liebowitz &
Latman, P.C.

1133 Avenue of the Americas
New York, NY 10036

BLOCK, District Judge:

Plaintiff Gregory Hudson ("Hudson"), appearing *pro se*, brings this action for infringement under the Federal Copyright Act, 17 U.S.C. § 101 et. Seq. Defendants are Universal Pictures Corporation (Universal"), Imagine Entertainment Corporation (Imagine"), Eddie Murphy (Murphy"), Dwight Meyers a/k/a Heavy D ("Meyers"), Brian Grazer (Grazer"), Robert Ramsey (Ramsey"), and Matthew Stone ("Stone"), all of whom are producers, co-producers, co-stars or co-writers of a feature film entitled *Life*. Hudson's complaint alleges that the defendants used the copyrighted script from his play *No Harm, No Foul* (Certificate of Registration No. Pau 1-860-849) as the sources of a substantial amount of material for *Life*.

Pending before the Court are two motions. First, Universal, Imagine and Murphy (collectively, "defendants') move for summary judgment "on the sole ground that *Life* is not substantially similar to *No Harm, No Foul* as to any material protected by copyright." Notice Of Motion For Summary Judgment Dismissing The Complaint at 2.[2] Second, Hudson moves for default judgment against Meyers.[3] After closely comparing *No Harm, No Foul* and *Life*, the Court concludes that no reasonable jury could find that the two works were substantially similar; accordingly it dismisses Hudson's complaint.

I.

---

[2]As required by Local Rule 56.2, defendants' motion was accompanied by a Notice To Pro Se Litigant Opposing Motion for Summary Judgment.

[3]Although served, Meyers has not appeared. The Court's docket sheet does not reflect any affidavits of service with respect to Grazer, Ramsey and Stone.

"A copyright-infringement action requires the copyright owner to prove [unauthorized] copying of a copyrighted work by an infringer." Kregos, 3 F .3d at 661 (2d Cir. 1993). To succeed, a plaintiff alleging infringement must first show that his work was actually copied. Copying may be established either by direct evidence of copying or by indirect evidence, including access to the copyrighted work, similarities that are probative of copying between the works, and expert testimony. If actual copying is established, a plaintiff must then show that the copying amounts to an improper appropriation by demonstrating that substantial similarity to protected material exists between the two works.

Laureyssens v. Idea Group, Inc., 964 F. 2d 131, 140 (2d Cir. 1992). For purposes of their summary judgment motion, defendants concede that *No Harm, No Foul* was properly copyrighted, that Hudson owns the copyright, that defendants had access to his script and/or the play's performances, and that actual copying occurred; the sole issue is whether there is a genuine issue of material fact as to whether a substantial similarity to protected material exists between *No Harm, No Foul* and *Life*.

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits...show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56c; see also *Celotex Corp. v. Catreet*, 477 U.S. 317, 322-23 (1986). The party seeking summary judgment has the burden of demonstrating that no genuine issue of material fact exists. See Adickes v. S.H. Kress & Co., 398 U.S. 144 157 (1970). In determining whether a genuine issue of material fact exists, the Court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant. See *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is improper if there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party. See Pinto v. Allstate Ins. Co., 221 F .3d 394, 398 (2d Cir. 2000).

Although in 1980 the Second Circuit stated that "summary judgment has traditionally been frowned upon in copyright

litigation" because "substantial similarity is customarily an extremely close question of fact," *Hoehling v. Universal City Studios*, Inc., 618 F .2d 972, 977 (2d Cir. 1980) (citations omitted), since then the circuit court has seemingly not hesitated to affirm the grant of summary judgment in copyright cases when "the similarity between the two works concerns only non-copyrightable elements of the plaintiff's work or [when] no reasonable jury, properly instructed, could find that the two works are substantially similar." *Arica Inst. Inc. v. Palmer*, 970 f. 2d 1067, 1072 (2d Cir. 1992) (citation omitted); *see, e.g., Matthew Bender & co. v. West Pub. Co.*, 158 F. 3d 693, 705 (2d cir. 1998) (affirming summary judgment: "if the similarity concerns only noncopyrightable elements of [a copyright holder's] work, or no reasonable tier of fact could find the works substantially similar, summary judgment is appropriate") (citation omitted); Williams v. Crichton, 84 F .3d 581, 590 (2d Cir. 1996) (affirming summary judgment: where "a lay observer would not find substantial similarities between the protectible material" of the two works in question, summary judgment appropriate); Kregos, 3 F .3d at 663 (affirming summary judgment: "lack of substantial similarity between the protectible aspects of the works was 'so clear as to fall outside the range of disputed fact questions' requiring resolution at trial') (citation omitted); Walker v. Time-Life Films, Inc., 784 F. 2d 44, 48 (2d Cir. 1986) (affirming summary judgment: "a district court may determine noninfringement as a matter of law on a motion for summary judgment either when the similarity concerns only noncopyrightable elements of plaintiff work, or when no reasonable tier of fact of fact could find the works substantially similar")

B. **Substantial Similarity**

The test for substantial similarity has been framed as whether "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and describe the aesthetic appeal of the two works as the same." *Arica* Inst., 970 f .2d at 1072 (internal brackets omitted); *see also Ideal Toy Corp. v. Fab-Lu, Ltd.*, 360 F .d 1021, 1022 (2d Cir. 1966) ("Whether an average lay observer would recognized the alleged copy as having been appropriated from the copyrighted work'). Determination of substantial similarity requires a detailed comparison of the works at issue, including "such aspects as the total concept

and feel, theme, character, plot, sequence, pace, and setting." *Williams*, 84 f .3d at 588. In conduction its comparison, however, the court must be mindful that "no author may copyright facts or ideas. The copyright is limited to those aspects of the work –termed'-that display the stamp of the author's originality' upon the facts or ideas. *Harper & Row Publishers, Inc. v. Nation enterprises*, 471 U.S. 539, 547 (1985); see also Fisher-Price, Inc... v. Well-Made toy Mfg. corp., 25 f .3d 199, 123 (2d Cir. 1994) ("the plaintiff must show that the defendant appropriated the plaintiff's particular means of expressing an idea, not merely that he expressed the same idea").

Further, as the Second circuit has instructed, substantial similarity requires that the copying [be] quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred. The qualitative component concerns the copying of expression, rather than ideas [, facts, works in public domain, or any other non-protectable elements]...The quantitative component generally concerns the amount of the copyrighted work that is copied, which must be more than *'de minimus.'*

Castle rock Entertainment, 150 F. 3d at 138 (quoting *Ringgold v. Black Entertainment Television*, Inc., 126 f .3d 70, 75 (2d Cir. 1997). The qualitative analysis, in excluding non-protectable [4] element, must exclude *scenes a faire*, a term which literally refers to "action scenes" but is legally defined as "unprotectible elements that flow naturally from the work's themselves rather than from the author's creativity." P& g v. Colgate-Palmolive Co., 199 F .3d 74, 78 (2d Cir. 1999). Substantial similarity may be found as a result of either "global similarities in structure and sequence" or "localized similarity in language." *Twin Peaks Productions, Inc. v. Publications Intern., Ltd.*, 996 f .2d 1366, 1372 (2d Cir. 1993).

---

[4]The discerning reader may notice that some courts have used the word "protectable" and others have spelled it as "protectible." The on-line edition of the Oxford English Dictionary recommends the former spelling, referring to the latter spelling as "rare." See

II.

Hudson's synopsis of No Harm, No Foul, as set forth is the play's script, [t]he story about a basketball player who is falsely (sic) accused of rape by a woman who wants to cash in on his skills as a potential basketball superstar. He is sentenced to pick cotton for one year on an illegal slave plantation in Walla Walla Washington and he resorts to all kinds of outrageous plans to escape.

[Plaintiff's] Notice of Opposition Motion to Defendant's Motion for Summary Judgment ("Opposition "), Ex. 6 (No Harm, No Foul script) at 3. The defendants summarize *Life* as the story of two very different New Yorkers – the small-time con man Rayford Gibson and the straight-lace, conventionally ambitious Claude banks [who]...travel to the deep South on a moonshine run, only to be framed for murder by a racist Mississippi sheriff. Sentenced to life in prison, the 'buddies' Ray and Claude spend the next 65 years trading insults and intermittently plotting their escape.

Memorandum of Law [of Defendants] in Support of Motion for Summary Judgment at 2. The Court finds both synopses to be accurate characterizations of the respective works.

In opposing defendants' motion, Hudson has submitted several drafts of the movie script (in excerpted form or in their entirety), as well as a videotape of a performance of the play and a number of still photographs from what appears to be the same performance of the play. Is the court is under no obligation to consider the draft Scripts, as it "need only consider the final version of the film as presented to the viewing public." Walker v. Time Life films, 615 f. supp. 430, 436, (S.D.N.Y. 1985) aff'd, 784 f. 2d 44 (2d cir. 1986). Mindful of Hudson's pro se status, the Court has nonetheless reviewed earlier drafts of the film, as well as all of Hudson's other submissions.

After reading the scripts and viewing the movie and the play, the court concludes that no reasonable jury could find a substantial similarity between the protected elements of *No Harm, No Foul* and *Life*. To be sure, the two works share superficial common aspects-for example, both involve false accusations against an African-

American male, both have prison –like settings and both involve escape attempts – but these similarities are not particularly emblematic of creative expression; rather, they are more in the nature of non-protectable ideas or *scenes a faire* common to the prison movie genre. In the Court's judgment, the scenes, characters, and dialogue from the play that Hudson claims are indicative of similarity are either non-protectable or substantially dissimilar to those in the movie.[5]

While Hudson levies a variety of allegations of similarity, each purported similarity between the two works is either so small as to be *de minus* or so inherent to the genre as to be unprotectable under the doctrine of *Scenes a faire*. Given the Court's Conclusion that no reasonable jury could conclude that *Life* is substantially similar to the protected elements of *No Harm, No Foul,* the court will not recount each of the alleged similarities.

---

[5]Hudson has submitted lists of dozens of what he alleges to be similarities between his play and the defendant's movie. For example, in *Life*, Sylvia "shows lots of cleavage to appear sexy and seductive; in *No Harm, No Foul*, Venessa "shows her cleavage and legs to appear sexy and seductive." Compl. [Attachment a, entitled "Scene Similarities"] at 3. In *life*, Ray and Claude "ride through the country to prison on an old bus," and in *No Harm, No Foul Bojack* "rides on the back of a truck to the plantation." Id. at 3. In Life, Ray and Claude "ride through the country to prison on an old bus," and in No Harm, *No Harm, No Foul*, "rides on the back of a tructo the plantation." *Id.* at 5. In both works the protagonists "follow [the authorities'] instructions reluctantly." *Id.* In *Life*, "it was very hot out there as the [y dug] ditches" and in *No Harm, No Foul* "]i]t was very hot in the cotton field as they picked cotton." *Id.* Hudson claims Colorado (of the play) and Can't Git right (of the movie are similar, saying "both [have] speech impediments, [and] both characters play the guitar and are horrible singers." Opposition at 22. the "speech impediments" referenced belong to, respectively, a character who consistently repeats his last three words and a character who is mute. The mere use of a character with a speech impediment fails to rise to infringement, as the Court must consider the "totality of the characters' attributes and traits." *Warner Bros.*, Inc. 720 f.2d at 241. similarly, Hudson urges the Court to find substantial similarity in the fact that each work has a scene in which a character consumes bootleg whiskey, which is referred to by an "idiosyncratic word." Opposition at 10. Even were the Court to reject the notion that bootleg alcohol is a commonplace aspect of the prison movie genre, the two scenes are notably dissimilar in length, dialogue and purpose. They do not even use the same 'idiosyncratic word' – the play uses 'splo,' while the movie character refers to the alcohol using the more commonplace term "hooch."

Apparently in further support of his position that defendants have infringed his work, Hudson makes a variety of other claims, including that defendants' retention of a law firm in this matter should be taken as evidence of their culpability and that defendants' inability to create original works. He also asserts that *Life* was copied from other sources, ranging from Hudson's other play Bronx House to Bingo Long Traveling All Stars and Motor Kings (a 1976 film in which Hudson, by all appearances, had on hand). As with the rest of Hudson's arguments, the Court finds these to be meritless.

To the extent that Hudson's complaint can be construed to raise an allegation of unfair competition under New York state law, such a claim is preempted by federal law. See NBA v. Motorola, Inc., 105 F.3d 841, 848 (2d Cir. 1997) ("Under § 301 [of the Copyright Act], a state law claim is preempted when: (i) the state law claim seeks to vindicate 'legal or equitable rights that are equivalent' to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106... and (ii) the particular work to which the state law claim is being applied falls within the type of works protected by the Copyright Act under Sections 102 and 103."). Additionally, the Court's determination that there is no substantial similarity between the two works precludes a finding under New York law that the defendants' assembled a product which bears so striking a resemblance to the plaintiff's product,' which is necessary for a finding of unfair competition in New York. *Shaw v. Time-Life Records*, 38 N.Y.2d 201, 205 (1975) ("The essence of an unfair competition claim is that the defendant assembled a product which bears so striking a resemblance to the plaintiff's product that the public will be confused as to the identify of the products.').

III.

The Court denies Hudson's motion for default judgment against Meyers. A default judgment is an extraordinary remedy, one which is "left to the sound discretion of a district court because it is in the best position to assess the individual circumstances of a given case and to evaluate the credibility and good faith of the parties." *Enron Oil corp. v. Diakuhara*, 10 F.3d 90, 95 (2d Cir. 1993). "where doubt exists as to whether a default should be granted or

vacated, the doubt should be resolved in favor of the defaulting party." *Id.* at 96.

"L[Al] defendant's default does not in itself warrant a court in entering default judgment [because] there must be a sufficient basis in the pleadings for the judgment entered." Journeyman Plumbers& Apprentices UA Local Union No. 22 v. Green, 2002 WL 1628849, at *18 (S.D.N.Y. 1996). To allow Hudson to recover a default judgment against on defendant when claims against similarly situated co-defendants have been found to be meritless would be "unseemly and absurd, as well as unauthorized by law." Diorama trading Co., Inc. v. J. Walter Thompson USA, Inc., 2002 WL 31545845, at *3 (S.D.N.Y. 2002) quoting from v. De La Vega, 82 U.S. 552, 554 (1872). There is nothing in Hudson's complaint to indicate that Meyer's liability would hinge on some fact not applicable to any other defendant in this action in this action. Meyers is not alleged to have written, directed or otherwise created the movie, but rather to have appeared in the movie as an actor after having had access to the script for the play. As the movie itself is not an infringement of No Harm, No Foul, the court discerns no basis upon which Meyers could be found liable.

Indeed, given the Court's determination that no substantial similarity exists between the two works, there is no basis upon which Meyers, Grazer, Ramsey or Stone could be found liable. Accordingly, the Court Sua Sponte grants summary judgment in favor of them and dismisses Hudson's complaint in its entirety. See Pugh v. Goord, 345 F.3d 121,124, (2d Cir. 2003) ("A Sua Sponte award of summary judgment may well be appropriate if it is clear that all of the evidentiary material a party might submit is before the court and no material issue of fact exists.") [6]

[6] In light of Hudson's receipt of a Local Rule 56.2 notice from defendants Universal, Imagine and Murphy, and given the futility of using his claims against the remaining defendants, the Court does not view any additional 56.2 notice to Hudson as necessary or appropriate.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF THE UNITED STATES

----------X

Gregory L. Hudson,

Plaintiff,

-against-

Mem. & Order
03-CV-1008
(FB) (LB)

Universal Pictures Corporation, Imagine Entertainment Corporation, Eddie Murphy, Dwight Meyers a/k/a Heavy D, Brian Grazer, Robert Ramsey, and Matthew Stone,

Defendants.

----------X

Appearances:

For the Plaintiff:
GREGORY HUDSON, *Pro Se*
146-61 182nd St.
Springfield Gardens,
New York 11413

For the Defendants Universal Pictures, Corporation, Imagine Entertainment Corporation, and Eddie Murphy:
RICHRARD DUNNAY, ESQ.
THOMAS KJELLBERG, ESQ.
Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, NY 10036

BLOCK, District Judge:

Pending before the Court are two motions. First, *Pro Se* plaintiff Gregory Hudson ("Hudson") moves for reconsideration of the Court's April 29, 2004 Memorandum and Order ("M&O") granting summary judgment to defendants Universal Pictures Corporation ("Universal"), Imagine Entertainment Corporation ("Imagine"), Eddie Murphy (Murphy"), Dwight Meyers a/k/a Heavy D, Brian Grazer, Robert Ramsey, and Matthew Stone. Second, universal, Imagine and Murphy request that the court award them costs and attorneys fees. The Court adheres to its original decision and denies the motion for costs and fees.

I.

The standard from granting a motion for reconsideration is "strict": reconsideration 'will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp.*, Inc., 70 F.3d 255, 257 (2d Cir. 1995). Contrary to Hudson's contention, the court carefully examined all the evidence presented concerning the alleged similarities between Hudson's play and the defendants' film, including the album of photographs Hudson submitted. Based on its examination, the court determined that even when viewed in the light most favorable to Hudson, on reasonable jury could conclude that the play and the film were substantially similar. See M&O at 7-8 (After reading the scripts and viewing the movie and the play, the Court concludes that no reasonable jury could find a substantial similarity between the protected elements of *No Harm, No Foul*...In the Court's judgment, the scenes, characters, and dialogue from the play that Hudson claims are indicative of similarity are either non-protectable or substantially dissimilar to those in the movie.") Hudson simply disagrees with the Court's conclusion; even holding him to a less stringent standard because of his *Pro Se* status, Haines v. Kerner, 404 U.s. 519, 520-21 (1972)), his motion to reconsider does not justify a different outcome.

Finally, to the extent Hudson claims that his prior attorneys committed malpractice in their handling of his case, Hudson may seek redress for alleged errors or omissions either by filing a

grievance with the appropriate attorney disciplinary board having jurisdiction over his former attorneys' practice or by timely instituting a separate malpractice action against his former attorneys. Such allegations, however, are outside the scope of the proceedings before the court and are not germane to the propriety of the grant of summary judgment.

II.

Contending that Hudson's infringement claim was objectively unreasonable, Universal, Imagine and Murphy seek $98,458 in attorneys' fees and $3, 944.84 in costs.

Section 505 of the Copyright Act provides:

In any civil action under this title, the court in its discretion may allow the recovery of full cost by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505. Emphasizing that '[t]he word 'may' clearly connotes discretion[,]" the Supreme Court in Fogerty v. Fantasy, 510 U.S. 517 (1994), identified "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence[]" as non-exclusive factors that 'may be used to guide courts' discretion' in deciding whether to award costs and fees. *Id.* at 533 n. 19. In *Matthew Bender & co., Inc. v. West Publ'g Co.*,240 f.3d 116 (2d Cir.2001), the Second Circuit explained that "objective reasonableness is a factor that should be given substantial weight in determining whether an award of attorneys' fees is warranted.' Id. at 122

Even though the Court determined at the summary judgment stage that no reasonable jury could have concluded that the two works at issue were substantially similar, the court does not view Hudson's infringement claim as so clearly without merit as to be objectively unreasonable. See Penguin Books USA v. New

Christian church of Full endeavor, Inc., 2004 WL 728878, at *3 (S.D.N.Y. April 6, 2004) ("the courts of this circuit have generally concluded that only those claims that are clearly without merit or otherwise patently devoid of legal or factual basis ought to be deemed objectively unreasonable"). In view of all the circumstances, the court exercises its discretion and declines to award costs and fees.

CONCLUSION

Hudson's motion for reconsideration is denied, as is Universal, Imagine and Murphy's motion for cost and fees.

SO ORDERED.

FREDERIC BLOCK
United States District Judge

Brooklyn, New York
May 25, 2004

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NEW YORK 10007

HUDSON,

Appellant,
Docket No(s). 04-3576

v.

UNIVERSAL STUDIONS CORPORATION, *ET AL.*

Appellees.

ORDER

Before: Hon. Richard C. Wesley, Hon. Peter W. Hall, circuit Judges, Hon. Michael B. Mukasey, District Judge*

IT IS HEREBY ORDERED that the motion to tax costs on appeal is GRANTED. Costs are taxed in the amount of $ 1,288.86 in favor of Appellees.

Date: May 19 2005 ROSEANN B. MACKECHNIE, CLERK
By: Tracy W. Young, Motion Staff Attorney

---

* The Honorable Michael B. Mukasey, chief Judge of the United States District Court, Southern District of New York, sitting by designation.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

HUDSON Case #cv03-1008

V.

Related Cases:

Judge: BLOCK

USCA

IMAGINE ENTERTAINMENT
CORPORATION

----------X

RECORD
ON APPEAL

Index Prepared By: Mary Ann McGee
Address: Eastern District of
New York

Telephone No.: (718) 260-2310

The document numbers circled on the following pages, with the original papers, constitute this record on appeal. Document numbers with an "*" beside the document number are missing and will be sent as soon as possible.

6/24/04
Brooklyn, NY

EXHIBITS INCLUDED

Exhibits d, F, G to Document #41 – video, DVD of *LIFE* and Video of *NO HARM, NO FOUL*.

Exhibit 23 to Document # 62 – 2 Photograph Albums from *LIFE* and *NO HARM, NO FOUL*.

Exhibit 24 to Document #62 – 4 Video-Tapes. 2 LIFE (1999), 2 NO HARM, NO FOUL (1996).